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## Note

### **Toward Definition, Not Discord: Why Congress Should Amend the Family and Medical Leave Act To Preclude Individual Liability for Supervisors**

*Taylor C. Stippel\**

Imagine that you are a low-level supervisor who works for a public agency. An employee approaches you and requests that you grant him leave under the Family and Medical Leave Act<sup>1</sup> (FMLA) to care for his intermittent asthma attacks. You consult a superior and are told to deny the request, and you follow your superior's instructions. Months later, you are informed that you, your superior, and the public agency for which you work are being sued by the employee who was denied FMLA leave. You are further informed that you might be on the hook for paying the suing employee's lost compensation and employee benefits for the time that he should have been on FMLA leave.

Such is the difficult situation faced by many modern supervisors. Beyond the traditional functions of hiring, firing, and promoting, supervisors are now charged with interpreting the complex statutory and regulatory scheme of the FMLA, which baffles even the shrewdest of lawyers.<sup>2</sup> Courts in the mid-1990s

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\* J.D. Candidate 2017, University of Minnesota Law School; B.A. 2014, Michigan Technological University. I would like to thank Professor Heidi Kitrosser for her invaluable feedback throughout the drafting process. Thanks also to Professor Stephen Befort for sharing his passion for employment law with me and all students lucky enough to have taken a class with him over the years. I would like to express my appreciation for the board and staff of the *Minnesota Law Review* for their diligent work. Thank you to my mother, Lori Stippel, for believing that I can conquer the world, despite evidence to the contrary. Thank you to my father, Roger Stippel, for always reminding me that my best is good enough. Thanks to my sister, Morgan Stippel, for teaching me to live courageously and unapologetically. And finally, thanks to Alec Sloan for his unwavering support and willingness to be a sounding board for my law-related musings. Copyright © 2016 by Taylor C. Stippel.

1. 29 U.S.C. §§ 2601–2654 (2012).

2. Several individuals and organizations have promulgated publications specifically tailored to answer supervisors' questions regarding the FMLA's

held that the FMLA exposes *private sector* supervisors to individual liability.<sup>3</sup> But because these early decisions relied almost exclusively on the similarity between the Fair Labor Standards Act<sup>4</sup> (FLSA) and FMLA definitions of “employer,”<sup>5</sup> their reasoning discouraged thorough, FMLA-specific policy analyses in future cases. Today, a federal circuit split exists on the question of whether the FMLA allows for the imposition of individual liability on *public sector* supervisors.<sup>6</sup> The Second, Third, Fifth, and Eighth Circuits have relied primarily on the similarity of the FMLA and FLSA definitions of “employer” to hold that individual liability may be imposed on public sector supervisors, reflecting analyses similar to those proffered by courts reaching

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complexities. *See, e.g.*, Carl C. Bosland, *Individual Supervisor Liability*, FMLA BLOG (Feb. 13, 2012), [http://federal FMLA.typepad.com/fmla\\_blog/individual\\_supervisor\\_liability](http://federal FMLA.typepad.com/fmla_blog/individual_supervisor_liability); *FMLA Training for Supervisors*, SOC’Y FOR HUM. RESOURCE MGMT., <https://www.shrm.org/resourcesandtools/tools-and-samples/presentations/pages/fmlatrainingforsupervisors.aspx> (last visited Oct. 15, 2016).

3. *See, e.g.*, *Knussman v. Maryland*, 935 F. Supp. 659, 664 (D. Md. 1996); *Freemon v. Foley*, 911 F. Supp. 326, 332 (N.D. Ill. 1995); *McKiernan v. Smith-Edwards-Dunlap Co.*, Civ. A. No. 95-1175, 1995 WL 311393, at \*3 (E.D. Pa. May 17, 1995).

4. 29 U.S.C. §§ 201–219. The FLSA regulates minimum wage, overtime pay, and child labor. *See id.* §§ 206, 207, 212. The FLSA defines “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee and includ[ing] a public agency.” *Id.* § 203(d). Persons who willfully violate the FLSA may be subjected to fines and imprisonment. *Id.* § 216(a). Employers who violate the FLSA may be liable for lost pay and an equal amount of liquidated damages, as well as any other legal or equitable relief that a court deems appropriate to effectuate the goals of the FLSA, such as reinstatement, promotion, and employment. *Id.* § 216(b).

5. *See Knussman*, 935 F. Supp. at 664 (“Liability under the FMLA is essentially the same as liability under the FLSA.”); *Freemon*, 911 F. Supp. at 330–32; *McKiernan*, 1995 WL 311393, at \*3.

6. *Compare Mitchell v. Chapman*, 343 F.3d 811, 829 (6th Cir. 2003) (holding that the FMLA does not impose individual liability on public officials), *and Wascura v. Carver*, 169 F.3d 683, 686–87 (11th Cir. 1999) (holding that a public official sued in his individual capacity is not an employer under the FMLA), *with Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 417 (3d Cir. 2012) (holding that the FMLA allows for the imposition of individual liability on public sector supervisors), *and Modica v. Taylor*, 465 F.3d 174, 187 (5th Cir. 2006) (holding a public employee individually liable under a plain language reading of the FMLA), *and Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002) (holding that a public official may be individually liable for violating the FMLA). Additionally, without distinguishing between the public and private sectors, the Second Circuit held that the FMLA allows for the imposition of individual liability on supervisors if the “economic reality” of the employment situation suggests that such liability is appropriate. *See Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 422 (2d Cir. 2016).

similar holdings in the mid-1990s with respect to private sector supervisors.<sup>7</sup> The Sixth and Eleventh Circuits, by contrast, have held against imposing individual liability on public sector supervisors on precedential and statutory interpretation grounds.<sup>8</sup>

It is essential that the current circuit split be resolved quickly, as the existing FMLA liability regime is detrimental to both employers and their supervisors. Employers in both the private and public sectors have been forced to rely on indefinite jurisprudence<sup>9</sup> in attempting to comply with the FMLA's terms since the statute was enacted and are entitled to a level of predictability that allows them to avoid exposing both themselves and their supervisors to FMLA liability.<sup>10</sup> For their part, supervisors are faced with the prospect of being held personally responsible for satisfying staggering damage awards and paying their own trial fees,<sup>11</sup> but are not afforded the guidance to know when such liability may attach. The current judicial disarray thus disadvantages both employers and their supervisors.

This Note offers a solution to the current circuit split regarding individual liability for public sector supervisors. Part I will describe the FMLA, the courts' rationale for finding in favor of individual liability for private sector supervisors, and the current circuit split as to individual liability for public sector supervisors. Part II will explore the problems with the courts' analyses of individual liability for private sector supervisors under the FMLA in the 1990s and address how such reasoning has tied the hands of the circuit courts as they analyze the in-

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7. See *infra* Part I.C.1.

8. See *infra* Part I.C.2.

9. See *infra* Parts I.B.1, II.A.1.

10. See 29 U.S.C. § 2601(b) (2012) (promising that the FMLA's purposes will be accomplished "in a manner that accommodates the legitimate interests of employers").

11. Although a supervisor may be indemnified by his employer for an adverse judgment and trial costs should a court hold him individually liable for an FMLA violation, such indemnification is not a certainty. See Judith E. Harris, *Ethical Issues in Employment Law*, AM. L. INST. CONTINUING LEGAL EDUC., [http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/source/CG060\\_17HarrisEthicsinEmploCG060\\_thumb.pdf](http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/source/CG060_17HarrisEthicsinEmploCG060_thumb.pdf) (last visited Oct. 15, 2016) ("[A]n employer generally is under no legal obligation to provide representation or indemnification of legal expenses for an employee who has been sued . . ."); see also *FMLA Alert: Supervisors May Be Personally Liable when Sued by Employees*, NOLAN PERRONI HARRINGTON, LLP (Feb. 29, 2012), <https://nphlegal.wordpress.com/2012/02/29/fmla-alert-supervisors-may-be-personally-liable-when-sued-by-employees> ("[M]any public employers DO NOT indemnify supervisors for judgments.").

dividual liability question in the public sector context. Part III will suggest a solution to the current division in the federal courts on the subject of individual liability. Specifically, this Note proposes that Congress resolve the current circuit split by amending the FMLA to preclude individual liability for supervisors, both public and private, and instead impose respondeat superior liability for FMLA violations.

### I. THE DISPOSAL OF THE INDIVIDUAL LIABILITY QUESTION AS TO PRIVATE SECTOR SUPERVISORS AND ITS RECENT REVIVAL IN THE PUBLIC SECTOR

While the FMLA may seem like a straightforward entitlement statute, the devil is in its details, many of which go unexplained or remain ambiguous in the FMLA and its implementing regulations. The FMLA and its legislative history do not explicitly describe which supervisors are considered “employers” within the meaning of the FMLA or whether supervisors may be held individually liable for violations of the Act.<sup>12</sup> Section A describes the FMLA’s purposes, definitions, and remedies. Section B examines the reasoning of 1990s court decisions holding in favor of and against individual liability for private sector supervisors, noting that the former view prevailed. Section C discusses the arguments raised in favor of and against individual liability in the current circuit split regarding individual liability for public sector supervisors. Finally, Section D summarizes where various courts stand on the individual liability question with respect to both the private and public sectors.

#### A. THE FMLA: PURPOSES, DEFINITIONS, AND REMEDIES

The FMLA entitles eligible employees<sup>13</sup> of covered employers<sup>14</sup> to take up to twelve weeks of unpaid leave in any twelve-

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12. See Sandra F. Sperino, *Under Construction: Questioning Whether Statutory Construction Principles Justify Individual Liability Under the Family and Medical Leave Act*, 71 MO. L. REV. 71, 97 (2006) (“[T]here is no legislative history to suggest the intent of Congress regarding individual liability under the FMLA . . . .”); Kegan A. Brown, Note, *My Individual Acts Can Get Me Fired, but Can My Supervisor’s Individual Acts Get Me Money?: Examining Individual Liability for Public Sector Supervisors Under the Family and Medical Leave Act*, 58 RUTGERS L. REV. 1023, 1043 (2006) (“[T]here is no relevant legislative history specifically covering public official individual liability.”).

13. In general, an employee is eligible to take advantage of FMLA leave if he or she has (1) been employed for at least twelve months by the employer from whom he or she requests leave; and (2) worked for at least 1,250 hours

month period for one of the following reasons: (1) the birth or adoption of a child; (2) to care for a child, spouse, or parent with a serious health condition;<sup>15</sup> (3) for the employee's own serious health condition that renders him or her unable to perform his or her job; or (4) any qualifying exigency arising from the fact that an employee's spouse, son, daughter, or parent is on covered active duty in the Armed Forces.<sup>16</sup> Employers are prohibited from interfering with employees' use of leave to which the FMLA entitles them, as well as from discriminating or retaliating against employees who have exercised their rights under the FMLA.<sup>17</sup> Congress delineated several purposes served by the FMLA and prescribed definitions and remedies in order to effectuate its remedial goals.<sup>18</sup> Additionally, Congress authorized the Secretary of Labor to promulgate regulations regarding the FMLA.<sup>19</sup> The remainder of Section A discusses the FMLA's purposes, definition of "employer," and remedies in order to put the individual liability problem in context.

### 1. The FMLA's Purposes

Congress enacted the FMLA in response to several findings, including the following: (1) employment policies were forcing working parents to choose between family and job security; (2) there was inadequate job security for working individuals with serious health conditions; and (3) the then-existing regulatory framework provided insufficient protection for working women, on whom the primary responsibility for childrearing disproportionately fell.<sup>20</sup> Thus, Congress's purpose in enacting the FMLA was two-fold: entitle eligible employees to unpaid

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for that employer during the previous twelve-month period. 29 U.S.C. § 2611(2)(A).

14. For a discussion of the types of employers covered by the FMLA, see *infra* Part I.A.2.

15. See 29 U.S.C. § 2611(11) ("The term 'serious health condition' means an illness, injury, impairment, or physical or mental condition that involves— (A) inpatient care at a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.").

16. *Id.* § 2612(a)(1). An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member is entitled to a total of twenty-six workweeks of leave during a twelve-month period to care for the service member. *Id.* § 2612(a)(3).

17. *Id.* § 2615.

18. See *id.* §§ 2601(b), 2611, 2617.

19. *Id.* § 2654.

20. *Id.* § 2601(a).

leave on a uniform basis and prevent discrimination on the basis of sex.<sup>21</sup>

## 2. The FMLA's Definition of "Employer"

Congress defined "employer" in the text of the FMLA, and the Department of Labor promulgated clarifying regulations. An "employer" under the FMLA is "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."<sup>22</sup> The FMLA's definition of "employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer."<sup>23</sup> The legislative history of the FMLA yields no substantive discussion of the term "employer" beyond giving the definition of that term as it appears in the FMLA itself.<sup>24</sup> In its regulations, the Department of Labor notes that the FMLA's definition of "employer" is similar to the FLSA's definition of "employer."<sup>25</sup> The Department of Labor's regulations further note that "normally the legal entity which employs the employee is the employer under FMLA."<sup>26</sup> Because employees bringing suit under the FMLA often bring claims against both the employing entity itself and specific individuals charged with violating the FMLA, many court opinions provide a threshold analysis of

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21. It is for this reason that the FMLA cannot easily be compartmentalized as either an entitlement or an antidiscrimination statute. See Catherine Brainerd, Note, *Hide and Seek: The FMLA Game of Personal Liability for Public Sector Supervisors*, 51 WAYNE L. REV. 1587, 1589 (2005) (noting that employees invoke an "Interference or Entitlement Theory" when they allege employer interference with leave to which they are entitled, while employees invoke a "Discrimination or Retaliation Theory" when they allege employer retaliation in response to employee assertion of FMLA rights).

22. 29 U.S.C. § 2611(4)(A)(i).

23. *Id.* § 2611(4)(A)(ii)(I).

24. See S. REP. NO. 103-3, at 43 (1993). While the Senate noted that "[t]hose definitions specifically referenced to the Fair Labor Standards Act are to be interpreted similarly under this Act," this blanket statement is relatively unhelpful as applied to the FMLA's definition of "employer" because only one subpart of this definition (the subpart referring to "public agencies") specifically references the FLSA. *Id.*

25. See 29 C.F.R. § 825.104(d) (2015) ("As under the FLSA, individuals such as corporate officers 'acting in the interest of an employer' are individually liable for any violations of the requirements of FMLA.").

26. *Id.* § 825.104(c).

which defendants are “employers” within the meaning of the FMLA.<sup>27</sup>

### 3. The FMLA’s Remedies

The FMLA provides that an aggrieved employee may recover damages in the amount of “any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation.”<sup>28</sup> If the employee has not suffered a loss of wages, salary, employment benefits, or other compensation, he or she may recover any actual monetary losses sustained as a result of the violation (e.g., the cost of providing care to a parent with a serious health condition).<sup>29</sup> A court may also award an amount of liquidated damages equal to the sum of the employee’s lost compensation (or actual monetary losses), unless the employer can demonstrate that its violation was in good faith and that it had reasonable grounds for believing that it did not violate the FMLA.<sup>30</sup> Finally, a court may award the employee appropriate equitable relief, including employment, reinstatement, or promotion.<sup>31</sup>

### B. INDIVIDUAL LIABILITY FOR PRIVATE SECTOR SUPERVISORS UNDER THE FMLA

Shortly after the FMLA was enacted, two lines of thought emerged regarding individual liability for private sector supervisors under the Act. While some courts analogized the FMLA to the FLSA and found in favor of individual liability,<sup>32</sup> others compared the FMLA to Title VII of the Civil Rights Act of 1964<sup>33</sup> (Title VII) and refused to impose individual liability.<sup>34</sup>

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27. See, e.g., *Johnson v. A.P. Prods., Ltd.*, 934 F. Supp. 625, 628–29 (S.D.N.Y. 1996); *Reich v. Midwest Plastic Eng’g, Inc.*, No. 1:94-CV-525, 1995 WL 478884, at \*5–6 (W.D. Mich. June 6, 1995).

28. 29 U.S.C. § 2617(a)(1)(A)(i)(I).

29. *Id.* § 2617(a)(1)(A)(i)(II).

30. *Id.* § 2617(a)(1)(A)(iii).

31. *Id.* § 2617(a)(1)(B).

32. See, e.g., *Knussman v. Maryland*, 935 F. Supp. 659, 664 (D. Md. 1996); *Freemon v. Foley*, 911 F. Supp. 326, 330–32 (N.D. Ill. 1995); *McKiernan v. Smith-Edwards-Dunlap Co.*, Civ. A. No. 95-1175, 1995 WL 311393, at \*3 (E.D. Pa. May 17, 1995).

33. 42 U.S.C. § 2000e (2012). Title VII makes it unlawful for employers to discriminate against any individual with regard to his or her compensation, terms, conditions, or privileges of employment on the basis of his or her race, color, religion, sex, or national origin. *Id.* § 2000e-2(a). An employer who intentionally violates Title VII may be required to reinstate or hire the individual who brought suit and may also be liable for back pay, as well as compensatory



The former view prevailed, and the majority of courts now hold that individual liability may be imposed on private sector supervisors.<sup>35</sup> The remainder of Section B will examine the evolution of the majority and minority views in greater detail in order to frame the current circuit split regarding individual liability in the public sector context.

1. Analogizing the FMLA to the FLSA: The Rationale Behind Finding Individual Liability for Private Sector Supervisors

Before introducing the court cases that found in favor of individual liability for private sector supervisors under the FMLA based on analogies to the FLSA, a short discussion of individual liability under the FLSA is warranted. Courts analyzing individual liability under the FLSA have applied a “control test” for determining which supervisors count as “employers” for FLSA purposes and, thus, are open to liability.<sup>36</sup> Application of the FLSA “control test” allows courts to determine which supervisors exercise sufficient control over employees to be deemed “employers,” and involves weighing the following factors: the authority to hire and fire employees, the authority to set the terms and conditions of employment, the authority to control and direct the conditions of employment, and the responsibility to pay wages.<sup>37</sup> Courts have applied the FLSA con-

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and punitive damages. *Id.* § 2000e-5(g)(1). An employer who can demonstrate that it would have taken the same employment action in the absence of an impermissible motivating factor will not be required to pay damages, reinstate, or hire the employee, but may be subjected to an injunction and be required to pay attorney’s fees. *Id.* § 2000e-5(g)(2).

34. See, e.g., *Carter v. Rental Unif. Serv. of Culpeper, Inc.*, 977 F. Supp. 753, 759 (W.D. Va. 1997); *Frizzell v. Sw. Motor Freight, Inc.*, 906 F. Supp. 441, 449 (E.D. Tenn. 1995).

35. See Brainerd, *supra* note 21, at 1607 (“In the private sector, the discussion over individual liability has been somewhat more muted, with a majority of the courts holding that individual liability for supervisors and similarly situated employees is proper.”).

36. See 2 LES A. SCHNEIDER & J. LARRY STONE, WAGE AND HOUR LAW § 21:13 (2015) (“[W]hether an individual is an employer is based on actions resulting from *control* and not on titles like ‘employer’ or ‘representative.’” (emphasis added)).

37. See *id.* No single factor is dispositive in determining which supervisors constitute employers, but “the authority to control and direct the conditions of employment is given the most weight of the four factors.” *Id.* For a detailed discussion of courts’ application of the FLSA “control test,” see Sandra F. Sperino, *Chaos Theory: The Unintended Consequences of Expanding Individual Liability Under the Family and Medical Leave Act*, 9 EMP. RTS. & EMP. POL’Y J. 175, 196–99 (2005).

trol test to hold liable upper-level individuals such as owners, major shareholders, chief executive officers, and company presidents.<sup>38</sup>

Many courts addressing the FMLA individual liability question in the private sector context turned to FLSA precedent for guidance in determining which supervisors constitute employers for FMLA purposes. These courts analyzed the FMLA's definition of "employer" by comparing it to the nearly identical definition of "employer" under the FLSA and, ultimately, applied FLSA case law to find in favor of individual liability for private sector supervisors under the FMLA.<sup>39</sup>

In *Freemon v. Foley*, deemed the "seminal case finding individual liability under the FMLA,"<sup>40</sup> the Northern District of Illinois held that the plaintiff-employee's immediate supervisor qualified as an employer under the FMLA and could be sued in her individual capacity.<sup>41</sup> The court reasoned that the definition of "employer" under the FMLA mirrored the definition of that term under the FLSA,<sup>42</sup> but not under antidiscrimination statutes like Title VII,<sup>43</sup> the Age Discrimination in Employment Act<sup>44</sup> (ADEA), and the Americans with Disabilities Act<sup>45</sup> (ADA).<sup>46</sup>

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38. See, e.g., *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965–66 (6th Cir. 1991); *Chambers Constr. Co. v. Mitchell*, 233 F.2d 717, 724 (8th Cir. 1956); *Usery v. Godwin Hardware, Inc.*, 426 F. Supp. 1243, 1246–47 (W.D. Mich. 1976).

39. See, e.g., *Knussman v. Maryland*, 935 F. Supp. 659, 664 (D. Md. 1996) ("Liability under the FMLA is essentially the same as liability under the FLSA."); *Freemon v. Foley*, 911 F. Supp. 326, 330–32 (N.D. Ill. 1995); *McKiernan v. Smith-Edwards-Dunlap Co.*, Civ. A. No. 95-1175, 1995 WL 311393, at \*3 (E.D. Pa. May 17, 1995).

40. *Meara v. Bennett*, 27 F. Supp. 2d 288, 291 (D. Mass. 1998).

41. See *Freemon*, 911 F. Supp. at 332.

42. See sources cited *supra* note 4.

43. See sources cited *supra* note 33. Title VII defines "employer" to include "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b) (2012).

44. 29 U.S.C. §§ 621–634 (2012). The ADEA defines "employer" to include "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . [and] any agent of such person." *Id.* § 630.

45. 42 U.S.C. §§ 12101–12213. The ADA defines "employer" to include "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." *Id.* § 12111.

46. See *Freemon*, 911 F. Supp. at 330.

The court then followed its FLSA precedent and delineated a version of the FLSA “control test” that it would apply to individual defendants in FMLA cases: “The FMLA extends to all those who controlled ‘in whole or in part’ [the employee’s] ability to take a leave of absence and return to her position.”<sup>47</sup> Because the employee’s immediate supervisor had recommended that she be terminated due to a month-long absence, the court held the supervisor liable in her individual capacity under the FMLA.<sup>48</sup> A number of other courts followed the *Freemon* court in turning to FLSA precedent and holding in favor of individual liability for private sector supervisors.<sup>49</sup>

Two trends emerged from the *Freemon* line of cases finding in favor of individual liability for private sector supervisors under the FMLA. First, courts developed several different “control tests” for determining whether individual liability attaches under the FMLA.<sup>50</sup> Across jurisdictions, these tests require different levels of control in order to find supervisors individually liable for FMLA violations.<sup>51</sup> Second, courts conducted brief and non-FMLA-specific policy analyses. Indeed, the *Freemon* opinion included no FMLA-specific policy analysis and the court stated that it would “look to the FLSA . . . to enlighten [its] interpretation of the term ‘employer’ under the FMLA”<sup>52</sup> before relying on FLSA case law to hold individually liable three supervisors.<sup>53</sup> Like the *Freemon* court, most courts relied almost exclusively on analogizing the FMLA’s definition of “employer” to the FLSA’s definition of “employer.”<sup>54</sup> Nevertheless, a majori-

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47. *Id.* at 332.

48. *Id.* at 331.

49. See, e.g., *Beyer v. Elkay Mfg. Co.*, No. 97 C 50067, 1997 WL 587487, at \*4 (N.D. Ill. Sept. 19, 1997); *Holt v. Welch Allyn, Inc.*, No. 95-CV-1135, 1997 WL 210420, at \*2 (N.D.N.Y. Apr. 15, 1997); *Knussman v. Maryland*, 935 F. Supp. 659, 664 (D. Md. 1996).

50. Sperino has noted that seven different FMLA “control tests” have emerged, each requiring a different level of control over the plaintiff-employee, the alleged FMLA violation, and the company’s dealings in order to impose individual liability. See Sperino, *supra* note 37, at 217.

51. See *id.* (“Some tests require the individual to have a high-level position within the company, while others require only a supervisory position. Still other tests contemplate that almost any individual who works for a company can be individually liable if he or she plays a role in the alleged violation.”).

52. *Freemon*, 911 F. Supp. at 330.

53. *Id.* at 332.

54. See Sperino, *supra* note 12, at 71 (“[T]he courts have merely punted, failing to provide any thorough analysis, by . . . referring to similar language in the Fair Labor Standards Act (‘FLSA’), which has been interpreted as allowing individual liability.”).

ty of courts have relied on comparing the FMLA to the FLSA in order to hold that individual liability may be imposed on private sector supervisors under the FMLA.<sup>55</sup>

## 2. Analogizing the FMLA to Title VII: The Rationale Behind the Refusal To Find Individual Liability for Private Sector Supervisors

Although the majority of courts held that individual liability could be imposed on private sector supervisors under the FMLA, a few courts refused to impose such liability.<sup>56</sup> For example, in *Frizzell v. Southwest Motor Freight, Inc.*, the Eastern District of Tennessee stated that the FMLA's definition of "employer" should be construed similarly to Title VII's definition of "employer."<sup>57</sup> Because the vast majority of circuit courts had held that individual liability for supervisors could not be imposed under Title VII,<sup>58</sup> the court held that such liability was not available under the FMLA, either.<sup>59</sup> The *Frizzell* court pointed to principles from an earlier case holding against the imposition of individual liability under Title VII to support its parallel holding regarding the FMLA, including the following: (1) Congress intended to incorporate respondeat superior principles under Title VII; (2) the remedies under Title VII are remedies that an employer, not an individual, would provide; and (3) individual liability under Title VII is inconsistent with the limitation of its reach to employers with fifteen or more employees.<sup>60</sup>

As exemplified by the *Frizzell* court's opinion, the courts holding against individual liability for private sector supervisors under the FMLA did so for the following reasons: (1) they

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55. See *Mitchell v. Chapman*, 343 F.3d 811, 827–28 (6th Cir. 2006) (supporting its assertion that the similarity between the FLSA and FMLA's definitions of "employer" supports a holding in favor of individual FMLA liability with citations to over fifteen cases).

56. See, e.g., *Carter v. Rental Unif. Serv. of Culpeper, Inc.*, 977 F. Supp. 753, 759 (W.D. Va. 1997); *Frizzell v. Sw. Motor Freight, Inc.*, 906 F. Supp. 441, 449 (E.D. Tenn. 1995).

57. *Frizzell*, 906 F. Supp. at 449.

58. See JOHN F. OLSON ET AL., DIRECTOR & OFFICER LIABILITY: INDEMNIFICATION AND INSURANCE § 3.11 (2015–2016 ed. 2015) ("Virtually all of the Circuit Courts of Appeals have . . . followed the lead of the Ninth Circuit in holding that Title VII does not impose individual liability, even if an employer's agent has supervisory authority over the complaining employee.").

59. See *Frizzell*, 906 F. Supp. at 449.

60. See *id.* (summarizing the court's reasoning in *Arnold v. Welch*, No. 1:92-CV-562, 1995 WL 785572 (E.D. Tenn. July 5, 1995)).

looked past the fact that the FMLA and FLSA define “employer” similarly;<sup>61</sup> and (2) they adopted a more functionalist approach, analyzing the policy implications of attaching individual liability to supervisors under the FMLA.<sup>62</sup> These courts recognized that federal employment statutes generally do not impose individual liability and attempted to construe the FMLA in a manner that was consistent with this pattern.<sup>63</sup> Nevertheless, the courts that resisted imposing individual FMLA liability on private sector supervisors espoused what became the minority view, as subsequent courts rejected analyses analogizing the FMLA to Title VII.<sup>64</sup>

C. DOWN, BUT NOT OUT: THE REVIVAL OF THE INDIVIDUAL LIABILITY QUESTION WITH REGARD TO PUBLIC SECTOR SUPERVISORS

Although the majority of courts have held that individual FMLA liability may be imposed on *private sector* supervisors, there is a persisting circuit split as to whether such liability attaches to *public sector* supervisors. Arguments cited by the circuit courts finding in favor of individual liability for public sector supervisors have largely paralleled those raised in the 1990s regarding the similarity between the FMLA and FLSA definitions of “employer.”<sup>65</sup> Those circuit courts opposing the imposition of individual liability on public sector supervisors have, however, turned to alternative lines of argument to sup-

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61. See, e.g., *Carter*, 977 F. Supp. at 759–60 (refusing to accept plaintiff’s citation of an FLSA case at face value, distinguishing its facts from those that were before the court, and opting to construe the FMLA’s definition of “employer” as that term had been construed in Title VII precedent).

62. See, e.g., *Frizzell*, 906 F. Supp. at 449.

63. See, e.g., *Carter*, 977 F. Supp. at 759 (“Personal liability for violations of Federal employment laws generally has been rejected . . . [and] the term ‘employer’ in the FMLA should be construed consistently . . .”).

64. See, e.g., *Richardson v. CVS Corp.*, 207 F. Supp. 2d 733, 743 (E.D. Tenn. 2001) (“[T]his Court is fortunately able to review the decisions of various district courts who have dealt with the issue of individual liability under the FLSA. The Court is persuaded by the reasoning of these later opinions and respectfully declines to concur with the decision rendered in *Frizzell*.”).

65. Compare, e.g., *Freemon v. Foley*, 911 F. Supp. 326, 330 (N.D. Ill. 1995) (“[W]e look to the FLSA . . . to enlighten our interpretation of the term ‘employer’ under the FMLA.”), with *Modica v. Taylor*, 465 F.3d 174, 186–87 (5th Cir. 2006) (commenting that “[t]he definition of ‘employer’ under the FMLA is very similar to the definition of ‘employer’ under the FLSA” and relying on circuit precedent to hold that public sector supervisors may be individually liable under the FMLA).

port their position.<sup>66</sup> The discussion below describes how modern circuit courts addressing the individual liability question as to public sector supervisors have both drawn from and adapted the reasoning of earlier courts that analyzed the same question in relation to the private sector.

1. Repeating History: The Second, Third, Fifth, and Eighth Circuits' Holdings in Favor of Individual Liability for Public Sector Supervisors

The Third, Fifth, and Eighth Circuits have held that individual liability may be imposed on public sector supervisors,<sup>67</sup> and the Second Circuit has held that individual liability may be imposed without specifying whether its holding is confined to the private sector.<sup>68</sup> These courts have reasoned that the plain language of the FMLA's definition of "employer" justifies the imposition of individual liability on public sector supervisors.<sup>69</sup> Additionally, these courts have echoed the arguments that emerged in the early 1990s regarding the similarity between the FMLA's and FLSA's definitions of "employer."<sup>70</sup> Looking beyond the language of the FMLA, the Third Circuit noted that the Department of Labor's implementing regulations confirm that the FMLA allows for the imposition of individual liability on both private and public sector supervisors.<sup>71</sup> Finally, the

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66. See, e.g., *infra* note 85 and accompanying text.

67. *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 417 (3d Cir. 2012); *Modica*, 465 F.3d at 187; see also *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002).

68. See *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 422 (2d Cir. 2016).

69. See, e.g., *Modica*, 465 F.3d at 184; *Darby*, 287 F.3d at 681.

70. Compare, e.g., *Graziadio*, 817 F.3d at 422 (citing several other federal court decisions and agreeing "that the standards used to evaluate 'employers' under the FLSA should therefore be applied to govern the FMLA as well"), and *Modica*, 465 F.3d at 186 ("Congress . . . chose to make the definition of 'employer' materially identical to that in the FLSA mean[ing] that decisions interpreting the FLSA offer the best guidance for construing the term 'employer' as it is used in the FMLA."), with *Freemon*, 911 F. Supp. at 330 ("[W]e look to the FLSA . . . to enlighten our interpretation of the term 'employer' under the FMLA.").

71. See *Haybarger*, 667 F.3d at 414 (laying out the text of the relevant regulations and asserting that "the Department of Labor responded to concerns of imposing individual liability under the FMLA by noting that the Fair Labor Standards Act . . . which defines 'employer' similarly to the FMLA, already holds 'corporate officers, managers and supervisors acting in the interest of an employer . . . individually liable.'" (quoting Summary of Major Comments for the FMLA Regulations, 60 Fed. Reg. 2180, 2181 (Jan. 6, 1995))).

Eighth Circuit asserted that there are no relevant differences between private and public sector supervisors such that individual FMLA liability should be imposed on the former, but not the latter, group.<sup>72</sup> Thus, the reasoning of the Second, Third, Fifth, and Eighth Circuits is similar to the reasoning that carried the day with respect to private sector individual liability shortly after the FMLA was enacted.

In addition to drawing from the reasoning of 1990s courts that analyzed the FMLA individual liability question as to the private sector, two circuit courts involved in the current split have opted to apply iterations of the FLSA “control test.”<sup>73</sup> In *Haybarger v. Lawrence County Adult Probation and Parole*, the Third Circuit adopted an “economic reality” test for determining when a public sector supervisor is subject to individual liability under the FMLA.<sup>74</sup> In so doing, the *Haybarger* court noted that “whether a person functions as an employer depends on the totality of the circumstances,” including factors such as whether the person possesses power to hire and fire, control employee work schedules or conditions of employment, or determine the rate and method of payment.<sup>75</sup> In *Graziadio v. Culinary Institute of America*, the Second Circuit also adopted an “economic reality” test and indicated that, in applying the test, it would “consider a ‘non-exclusive and overlapping set of factors,’” intended “to ‘encompass . . . the totality of the circumstances.’”<sup>76</sup> The Second Circuit’s “economic reality” test includes the following factors: ability to hire and fire employees, supervision and control of employee work schedules or conditions of employment, determination of the rate and method of payment, and maintenance of employment records.<sup>77</sup> Thus, it appears that *Haybarger* and *Graziadio* may foreshadow the development of more “control tests” for determining individual liability for public sector supervisors under the FMLA, a phenomenon

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72. See *Darby*, 287 F.3d at 681.

73. See *Graziadio*, 817 F.3d at 422–23; *Haybarger*, 667 F.3d at 417–18.

74. See *Haybarger*, 667 F.3d at 417–18 (pointing particularly to an iteration of the “economic reality” test articulated by the Second Circuit).

75. *Id.* (applying the factors enumerated by the Second Circuit in *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999)).

76. *Graziadio*, 817 F.3d at 422 (first quoting *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 75 (2d Cir. 2003); then quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999)).

77. See *id.*

that occurred when the individual liability question was considered with respect to private sector supervisors.<sup>78</sup>

## 2. The Sixth and Eleventh Circuits' Refusal To Impose Individual Liability on Public Sector Supervisors

Contrary to the approach adopted by their sister circuits, the Sixth and Eleventh Circuits have declined to impose individual liability on public sector supervisors.<sup>79</sup> In holding against individual liability for public sector supervisors, the Sixth and Eleventh Circuits have not relied on the line of reasoning comparing the FMLA to Title VII,<sup>80</sup> under which individual liability is not imposed on supervisors.<sup>81</sup> While the Sixth Circuit had held in favor of individual liability for private sector supervisors before deciding *Mitchell v. Chapman*,<sup>82</sup> the Eleventh Circuit had not addressed the question of individual FMLA liability prior to deciding *Wascura v. Carver*.<sup>83</sup> In *Wascura v. Carver*, the Eleventh Circuit noted the similarity between the FLSA and FMLA's definitions of "employer," and held against imposing individual FMLA liability on a public sector supervisor because Eleventh Circuit FLSA precedent had done the same.<sup>84</sup> In *Mitchell v. Chapman*, the Sixth Circuit asserted that principles of statutory interpretation justified holding against individual liability for public sector supervisors under the FMLA.<sup>85</sup> Thus,

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78. See *supra* notes 50–51 and accompanying text.

79. See *Mitchell v. Chapman*, 343 F.3d 811, 829 (6th Cir. 2003); *Wascura v. Carver*, 169 F.3d 683, 687 (11th Cir. 1999).

80. See *Mitchell*, 343 F.3d at 825–33; *Wascura*, 169 F.3d at 685–87.

81. See *supra* Part I.B.2.

82. See *Mitchell*, 343 F.3d at 830 n.22 (noting the Sixth Circuit's "prior determination that the FMLA extends individual liability to private-sector employers"). The Sixth Circuit justified its differing treatment of private and public sector supervisors on statutory interpretation grounds. See *id.* at 829–32.

83. See *Wascura*, 169 F.3d at 685 ("This is our first occasion to address the meaning of 'employer' under the FMLA.").

84. See *id.* at 686–87.

85. See *Mitchell*, 343 F.3d at 829–33. The Sixth Circuit analyzed the FMLA's definition of "employer" in the context of the entire statute, citing the following justifications for its holding:

First, Section 2611(4)(A) segregates the provision imposing individual liability from the public agency provision. Second, an interpretation that commingles the individual liability provision with the public agency provision renders certain provisions of the statute superfluous [e.g., 29 U.S.C. § 2611(4)(B) (2012), which states that "a public agency shall be considered to be a person engaged in commerce or in an industry affecting commerce"] and results in several oddities. Finally, . . . the FMLA distinguishes its definition of employer from that



the Eleventh Circuit utilized the reasoning of the majority view comparing the FMLA to the FLSA,<sup>86</sup> and the Sixth Circuit relied on what it perceived as a statutory distinction between private and public sector supervisors in order to hold against imposing individual liability.<sup>87</sup>

Additionally, at least one court has engaged in a critical analysis of whether imposing individual liability on public sector supervisors would serve Congress's purposes in enacting the FMLA. In *Keene v. Rinaldi*, a Postal Service employee brought an FMLA action against the Postal Service and his managers.<sup>88</sup> In holding that supervisors of public agencies were not "employers" under the FMLA, the court asserted that "[t]here is no reason to think that Congress would have intended subsection 4(A)(ii)(I) to have included all of an employee's supervisors as potential employers."<sup>89</sup> Rather, the court read the FMLA's definition of "employer" as an attempt by Congress to "ensure that someone will be responsible for paying for or rectifying a FMLA violation."<sup>90</sup> The court noted that an interpretation of "employer" that included supervisors would fill FMLA cases with "personal disputes" and "matters of office politics."<sup>91</sup> Finally, the court acknowledged that it would be strange for a plaintiff-employee to name as an "employer" a supervisor who may hold a position barely higher than that of the plaintiff-employee himself or herself.<sup>92</sup> In the absence of guidance from Congress in the form of clear statutory language or legislative history, the *Keene* court conducted a policy analysis to determine whether the FMLA's goals would be effectuated by imposing individual liability on public sector supervisors.<sup>93</sup>

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provided in the FLSA by separating the individual liability and public agency provisions.

*Id.* at 832.

86. See *Wascura*, 169 F.3d at 686 ("[W]e look to FLSA decisions to determine whether the term 'employer' includes a public official . . .").

87. See *supra* note 85.

88. 127 F. Supp. 2d 770, 772 (M.D.N.C. 2000).

89. *Id.* at 777.

90. *Id.*

91. *Id.* at 776–77.

92. See *id.*

93. See *id.*

## D. THE CURRENT FMLA INDIVIDUAL LIABILITY SCORECARD

In sum, a majority of courts resolved the individual liability question in the private sector in favor of individual liability for supervisors. Most courts relied on the similarity between the FLSA and FMLA's definitions of "employer" and the fact that individual liability may be imposed under the FLSA to find that individual liability could also be imposed under the FMLA.<sup>94</sup> While some courts used a functionalist analytical lens and compared the FMLA to Title VII,<sup>95</sup> an antidiscrimination statute which does not impose individual liability, this line of reasoning did not carry the day.

With respect to the public sector, the question of individual liability for supervisors remains unresolved. The Third, Fifth, and Eighth Circuits have held in favor of imposing individual liability on public sector supervisors,<sup>96</sup> and the Second Circuit has held that individual liability may attach to supervisors without specifying whether that holding is confined to the private sector context.<sup>97</sup> In contrast, the Sixth and Eleventh Circuits have held against imposing such liability on public sector supervisors.<sup>98</sup> Among other justifications, the former group of courts has relied on the similarity of the FLSA and FMLA definitions of "employer" in opting to impose individual liability on public sector supervisors,<sup>99</sup> while the latter group of courts has resisted imposing such liability on public sector supervisors on precedential and statutory interpretation grounds.<sup>100</sup> The un-

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94. See, e.g., *Knussman v. Maryland*, 935 F. Supp. 659, 664 (D. Md. 1996); *Freemon v. Foley*, 911 F. Supp. 326, 330–32 (N.D. Ill. 1995); *McKiernan v. Smith-Edwards-Dunlap Co.*, Civ. A. No. 95-1175, 1995 WL 311393, at \*3 (E.D. Pa. May 17, 1995).

95. See, e.g., *Carter v. Rental Unif. Serv. of Culpeper, Inc.*, 977 F. Supp. 753, 759 (W.D. Va. 1997); *Frizzell v. Sw. Motor Freight, Inc.*, 906 F. Supp. 441, 449 (E.D. Tenn. 1995).

96. See *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 417 (3d Cir. 2012); *Modica v. Taylor*, 465 F.3d 174, 187 (5th Cir. 2006); *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002).

97. See *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 422 (2d Cir. 2016).

98. See *Mitchell v. Chapman*, 343 F.3d 811, 829 (6th Cir. 2003); *Wascura v. Carver*, 169 F.3d 683, 687 (11th Cir. 1999).

99. See, e.g., *Haybarger*, 667 F.3d at 414.

100. See *Mitchell*, 343 F.3d at 829–33 (focusing its opinion on an "examination of the FMLA's text and structure"); *Wascura*, 169 F.3d at 686–87 (relying on the Eleventh Circuit's rationale in *Welch v. Laney*, 57 F.3d 1004 (11th Cir. 1995)).

predictability and lack of uniformity resulting from the current circuit split demand a swift resolution.

## II. BAD PRECEDENT PRODUCES BAD RESULTS: THE NEGATIVE IMPACT OF PRIVATE SECTOR INDIVIDUAL LIABILITY ANALYSES ON SUBSEQUENT PUBLIC SECTOR INDIVIDUAL LIABILITY ANALYSES

Unsurprisingly, circuit courts attempting to resolve the individual liability question as to public sector supervisors have looked for guidance in the opinions of mid-1990s and early 2000s courts that analyzed the same issue with respect to private sector supervisors.<sup>101</sup> But while adherence to precedent is often beneficial, the perpetuation of unpredictability and abbreviated analyses is detrimental when it disadvantages both supervisors and the employers for whom they work. Section A highlights two issues with 1990s and early 2000s courts' disposal of the individual liability question with respect to private sector supervisors: the creation of several different judicial "control tests" and insufficient analyses of the relevant differences between the FLSA and FMLA. Section B discusses how these analytical issues have been perpetuated by modern circuit courts, whose hands are tied by bad precedent as they address the individual liability question with regard to public sector supervisors.

### A. THE PROBLEMS WITH EARLY CASES FINDING IN FAVOR OF INDIVIDUAL LIABILITY FOR PRIVATE SECTOR SUPERVISORS

The reasoning of early court opinions holding that individual liability could be imposed on private sector supervisors was, in a sense, paradoxical: these opinions based the bulk of their analyses on the similarities between the FMLA and FLSA's definition of "employer," but adopted a multiplicity of "control tests" that were based only loosely on the FLSA's more definite "control test."<sup>102</sup> Additionally, many of these early opinions paid

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101. See Scott Baker & Anup Malani, Do Judges Actually Care About the Law? Evidence from Circuit Split Data 3 (Sept. 17, 2015) (unpublished faculty workshop paper) (on file with Washington University School of Law), <https://www.law.wustl.edu/faculty/documents/Workshops/Do%20judges%20actually%20care%20about%20the%20law%20150914.pdf> (studying judicial behavior and concluding that "judges do learn from prior judges and are not purely political actors").

102. The FLSA's control test limits the individuals upon which individual liability may be imposed. See Sperino, *supra* note 37, at 196 ("With few exceptions, the FLSA's definition of 'employer' has been interpreted to allow indi-

little or no attention to the relevant differences between the FMLA and the FLSA.<sup>103</sup> Section A provides a critical examination of the FMLA's several judicial "control tests" and the dearth of FMLA-specific analysis in early individual liability cases.

### 1. A Multiplicity of "Control Tests"

While the concept of an FMLA "control test" is not intrinsically undesirable, FMLA "control tests" have proven problematic in practice due to courts' tendency to emphasize different aspects of the employment relationship<sup>104</sup> and supplement their "control tests" with nebulous "totality of the circumstances" or similar language that allows for unpredictable application of such tests.<sup>105</sup> Early litigation over individual FMLA liability for private sector supervisors produced several "control tests," each placing different levels of emphasis on the various ways that an employer exercises control over its employees' employment.<sup>106</sup> For example, while some courts have emphasized a supervisor's power to grant employee leave requests in holding that a pri-

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vidual liability only when the defendant is a high-level individual within the company and has control over the operation of the company or over wage and hour policy."). In contrast, iterations of FMLA "control tests" that emerged in the mid-1990s provided that a wider variety of private sector individuals could be held individually liable. *See infra* Part II.A.1.

103. *See, e.g.,* *Meara v. Bennett*, 27 F. Supp. 2d 288, 291 (D. Mass. 1998) (denying individual defendant's motion for summary judgment on the issue of whether he constituted an "employer" for FMLA purposes by noting that "numerous courts" have found individual liability under the FMLA "based on the similarity between the language of that statute and the FLSA"); *McKiernan v. Smith-Edwards-Dunlap Co.*, Civ. A. No. 95-1175, 1995 WL 311393, at \*3 (E.D. Pa. May 17, 1995) (devoting one paragraph to dismissing a private sector supervisor's motion for summary judgment on the issue of whether he constituted an "employer" within the meaning of the FMLA and relying solely on FLSA case law to do so).

104. *See infra* notes 106–08 and accompanying text.

105. *See, e.g.,* *Smith v. Ctr. for Organ Recovery & Educ.*, Civ. A. No. 13-428, 2013 WL 4049550, at \*1 (W.D. Pa. Aug. 9, 2013) (delineating a multi-factor "control test" for determining whether an individual constitutes an "employer" for FMLA purposes, but noting that "[t]hese factors . . . are not dispositive, and the Court must consider any other relevant evidence of a supervisory relationship"); *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 418 (3d Cir. 2012) ("[W]hether a person functions as an employer depends on the totality of the circumstances rather than on 'technical concepts of the employment relationship.'" (quoting *Hodgson v. Anheim & Neely, Inc.*, 444 F.2d 609, 612 (3d Cir. 1971), *rev'd sub nom.*, *Brennan v. Anheim & Neely, Inc.*, 410 U.S. 512 (1973))).

106. *See supra* notes 50–51 and accompanying text.

vate sector supervisor may be found individually liable,<sup>107</sup> others have held that private sector employees must hold high-level company positions in order to open themselves up to individual liability.<sup>108</sup> While courts interpreting the FLSA's definition of "employer" have largely imposed individual liability on only high-level employees,<sup>109</sup> some courts have adopted FMLA "control tests" that allow for individual FMLA liability to attach to even low-level employees.<sup>110</sup> Thus, as Professor Sandra Sperino notes, "individuals ranging from low-level supervisors to business owners may be jointly and severally liable for FMLA violations."<sup>111</sup>

Several problems inhere in the inconsistency of the FMLA "control tests" that emerged in the mid-1990s. First, "control tests" that allow for individual liability to be imposed on low-level private employees are arguably in conflict with the Department of Labor's regulations, which specify that "individuals *such as corporate officers*" may be held individually liable for FMLA violations.<sup>112</sup> By specifically identifying "corporate officers," the Department of Labor arguably intended that only high-level employees be held individually liable. Additionally, unpredictability resulting from variation in and judicial manipulation of "control tests" provides little guidance to supervisors,<sup>113</sup> who could be on the hook for paying high trial costs and

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107. See, e.g., *Bryant v. Delbar Prods., Inc.*, 18 F. Supp. 2d 799, 808 (M.D. Tenn. 1998).

108. See, e.g., *Brunelle v. Cytec Plastics, Inc.*, 225 F. Supp. 2d 67, 82 (D. Me. 2002) (noting that, while the supervisor in question was responsible for making decisions contributing to the alleged denial of the employee's FMLA leave request, "as a front-line supervisor—at the bottom of four rungs of management—he simply was not a prominent enough player in [the employer's] operations to be considered an 'employer' for purposes of the FMLA"); see also Sperino, *supra* note 37, at 214–15.

109. See, e.g., *Dole v. Cont'l Cuisine, Inc.*, 751 F. Supp. 799, 802–03 (E.D. Ark. 1990) (holding that an individual was not an "employer" for FLSA purposes because he did not hire and fire employees, control the business's methods of operation, or control the payroll); see also Sperino, *supra* note 37, at 198–99, 199 n.130.

110. See, e.g., *Beyer v. Elkay Mfg. Co.*, No. 97 C 50067, 1997 WL 587487, at \*1–4 (N.D. Ill. Sept. 19, 1997) (refusing to dismiss a low-level supervisor as a defendant, despite the fact that his sole involvement in the alleged FMLA violation was telling the plaintiff-employee that her absence would be counted as vacation time); see also Sperino, *supra* note 37, at 213–14.

111. See Sperino, *supra* note 37, at 177.

112. 29 C.F.R. § 825.104(d) (2015) (emphasis added).

113. See *infra* note 115.

damage awards should they be held individually liable.<sup>114</sup> Finally, the wide variety of “control tests” and broad judicial discretion in applying them leads to a lack of uniformity and predictability for employers who are forced to guess at the law when instructing their supervisors as to the circumstances under which they could open themselves up to individual liability under the FMLA.<sup>115</sup>

A brief hypothetical illustrates how the multiplicity of FMLA “control tests” can disadvantage an employer seeking to avoid FMLA violations and candidly advise its supervisors regarding their liability exposure. Imagine a national corporation with branches in Chicago and Detroit, among other locations. The corporation decides that it would like to create an FMLA handbook to be distributed to supervisors at all of its branches. This handbook would instruct supervisors on how to uphold the terms of the FMLA and would also advise supervisors as to their liability exposure. When the corporation researches case law from Illinois and Michigan, it realizes that the liability exposure of its low-level supervisors is vastly different between the two states. In Illinois, one need only have exercised some supervisory role over a suing employee and interfere with the suing employee’s rights under the FMLA to be held individually liable.<sup>116</sup> By contrast, Michigan employs an “economic realities” test and holds individually liable only those with “opera-

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114. See Denise Kay, *Ann E. Employee v. You: Personal Liability and the HR Professional*, HR.COM (July 1, 2005), <http://www.hr.com/SITEFORUM?&t=/Default/gateway&i=1116423256281&application=story&active=no&ParentID=1119278127660&StoryID=1120080532484&xref> (“It may be financially devastating for an individual expected to foot a legal bill on his or her own. The estimated cost of defending a lawsuit, excluding trial costs, is \$150,000.”).

115. See *id.* (noting that “HR professionals and organization officials grapple with FMLA issues” with “little definitive guidance,” yet can nevertheless “face liability for their involvement” in violations); Grant B. Osborne, *Supervisor to Employee: “You Want FMLA Leave? No Problem!”*, N.C. LAB. & EMP. BLOG (Jan. 8, 2014), <http://www.wardandsmith.com/blog/supervisor-to-employee-you-want-fmla-leave-no-problem> (“Employers that wish to be honest with supervisory employees who field and handle the administration of requests for leaves of absence made pursuant to the FMLA should consider including the following admonition in these employees’ job descriptions: ‘Warning: Acceptance of this job may enhance your career. It may also get you sued.’”).

116. See *Llante v. Am. NTN Bearing Mfg. Corp.*, No. 99 C 3091, 1999 WL 1045219, at \*5 (N.D. Ill. Nov. 15, 1999) (holding that the plaintiff-employee’s allegations that the defendant-supervisors “exercised some supervisory role over him and interfered with his rights under the FMLA [were] enough to survive dismissal”).

tional control of *significant aspects* of the corporation's day to day functions."<sup>117</sup> Noticing the wide variety of "control tests" across jurisdictions, the corporation is left with a couple of options: (1) expend valuable time and resources to create a jurisdiction-by-jurisdiction handbook for its supervisors or (2) give up on the handbook and instruct supervisors to be overly cautious in making FMLA leave determinations, or risk being held individually liable for FMLA violations. Neither option is particularly attractive. This hypothetical illustrates how the wide variety of judicial "control tests" and consequent unpredictability of liability exposure renders hollow the FMLA's promise to accomplish its purposes "in a manner that accommodates the legitimate interests of employers."<sup>118</sup>

## 2. Inadequate Analyses of the Differences Between the FMLA and the FLSA

In addition to providing little clarity as to when a private sector supervisor may be held individually liable under the FMLA, early court opinions addressing the individual liability issue disposed of it by focusing almost exclusively on similarities between the FMLA and the FLSA.<sup>119</sup> Although the FMLA and the FLSA do define "employer" similarly and the FLSA does allow for the imposition of individual liability on supervisors, the analyses of many early courts stopped here.

Courts in the mid-1990s and early 2000s should have considered the relevant differences between the FMLA and the FLSA. First, as Boyd Rogers argues, "the FMLA explicitly recognizes that it is an anti-discrimination statute, and not a labor statute such as the FLSA."<sup>120</sup> This assertion is supported by the fact that Congress cited the prevention of sex discrimination as a core purpose of the FMLA.<sup>121</sup> As will be discussed in Part III.B, *infra*, courts have held that several prominent federal antidiscrimination statutes allow for the imposition of respondeat superior liability, not individual liability.<sup>122</sup> Second,

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117. *Reich v. Midwest Plastic Eng'g, Inc.*, No. 1:94-CV-525, 1995 WL 478884, at \*6 (W.D. Mich. June 6, 1995) (quoting *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 966 (6th Cir. 1991)).

118. 29 U.S.C. § 2601(b)(4) (2012).

119. *See supra* Part I.B.1.

120. Boyd Rogers, Note, *Individual Liability Under the Family and Medical Leave Act of 1993: A Senseless Detour on the Road to a Flexible Workplace*, 63 BROOK. L. REV. 1299, 1332 (1997) (footnote omitted).

121. 29 U.S.C. § 2601(b)(4)–(5).

122. *See infra* notes 158–59 and accompanying text.

the FLSA's remedies differ based on whether the violator is the employer entity or an individual supervisor, while the FMLA's remedies make no such distinction.<sup>123</sup> The remedies provided for by the FMLA are remedies that an individual supervisor is ill-equipped to provide.<sup>124</sup> Finally, the FLSA is a strict compliance statute, and Congress included no language regarding the interests of employers in the FLSA.<sup>125</sup> In contrast, the FMLA provides that its purposes should be accomplished "in a manner that accommodates the legitimate interests of employers."<sup>126</sup> Surely, one of the "legitimate interests" of an employer is the ability to structure its business in such a way as to avoid legal liability. As discussed in Part II.A.1, the current array of "control tests" and their vulnerability to judicial manipulation prevents employers from predicting with any certainty what employees or supervisors will be subject to individual FMLA liability. Had the courts addressing the individual liability question in the private sector examined the differences between the FLSA and FMLA in any detail, they may have questioned the prudence of imposing individual liability on private sector supervisors.

#### B. HANDS TIED: HOW HISTORY IS REPEATING ITSELF IN COURTS' ANALYSES OF INDIVIDUAL LIABILITY FOR PUBLIC SECTOR SUPERVISORS

Courts involved in the current circuit split regarding individual FMLA liability for public sector supervisors have drawn from the reasoning of the earlier decisions addressing this question as to private sector supervisors.<sup>127</sup> Part II.B focuses on two results of modern circuit courts' reliance on earlier courts' reasoning. First, the analyses of two modern courts foreshadow the creation of even more "control tests."<sup>128</sup> Second, the analyses

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123. See Rogers, *supra* note 120, at 1332–34. Compare 29 U.S.C. § 216(a)–(b) (subjecting a "person" to a fine of up to \$10,000 and/or to imprisonment of up to six months and subjecting an "employer" to liability for the amount of money that the aggrieved employee would have received but for the violation, plus possible liquidated damages and attorney's fees), with *id.* § 2617(a) (stating that "employers" are subject to providing an aggrieved employee backpay, reinstatement, and possible liquidated damages and attorney's fees).

124. See *infra* note 168 and accompanying text.

125. See 29 U.S.C. § 202 (putting forth Congress's findings and policy, but lacking any such language).

126. *Id.* § 2601(b)(3).

127. See *supra* note 65 and accompanying text.

128. See *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 422–23 (2d Cir.



by courts involved in the current split are plagued by a continued failure to address the relevant differences between the FLSA and FMLA.<sup>129</sup>

1. *Graziadio*, *Haybarger*, and the Foreshadowing of More “Control Tests”

In *Graziadio v. Culinary Institute of America* and *Haybarger v. Lawrence County Adult Probation & Parole*, the Second and Third Circuits, respectively, applied “economic reality” tests to determine whether supervisors were “employers” for purposes of the FMLA, listing several relevant factors.<sup>130</sup> However, both circuit courts’ “control tests” leave room for judicial manipulation. The Third Circuit added the following cryptic postscript to its “control test”: “Whether a person functions as an employer depends on the totality of the circumstances rather than on ‘technical concepts of the employment relationship.’”<sup>131</sup> And while the Third Circuit’s language leaves wide leeway for the exercise of judicial discretion, it is arguable that the Second Circuit’s test allows for even more wiggle room for courts: the *Graziadio* court included both “totality of the circumstances” language *and* commented that the four factors listed by the court constituted “a nonexclusive and overlapping set of factors.”<sup>132</sup> The malleability of judicial tests including “totality of the circumstances” language has been recognized with respect to several areas of law,<sup>133</sup> and the Second and Third Cir-

2016); *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 417–18 (3d Cir. 2012).

129. See, e.g., *Darby v. Bratch*, 287 F.3d 673, 681–82 (8th Cir. 2002) (stating that “the plain language of the [FMLA]” dictates that individual liability attaches to public sector supervisors).

130. See *Haybarger*, 667 F.3d at 418–19 (noting that a Second Circuit FLSA case listed the following as relevant factors in assessing the economic reality of the employment situation: (1) power to hire and fire; (2) supervision and control of employee work schedules or conditions of employment; (3) ability to determine the rate and method of payment; and (4) responsibility to maintain employment records (citing *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999))); *supra* notes 73–77 and accompanying text.

131. *Haybarger*, 667 F.3d at 418 (quoting *Hodgson v. Arnheim & Neely, Inc.*, 444 F.2d 609, 612 (3d Cir. 1971)).

132. *Graziadio*, 817 F.3d at 422 (quoting *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 75 (2d Cir. 2003)).

133. See, e.g., Jordan Gross, *If Skilling Can’t Get a Change of Venue, Who Can? Salvaging Common Law Implied Bias Principles from the Wreckage of the Constitutional Pretrial Publicity Standard*, 85 TEMP. L. REV. 575, 600 (2013) (“In practice, totality of the circumstances inquiry has proven to permit so much decisional latitude that it has produced a change-of-venue jurispru-

cuit's use of the phrase suggests that courts will continue to attach addendums to their multi-factor FMLA "control tests," inviting judicial manipulation and leading to unpredictable application of such tests. Thus, *Graziadio* and *Haybarger* foreshadow an outcome similar to that which resulted from the earlier dispute over individual liability for private sector supervisors: more pliable "control tests," less uniformity, and less predictability for employers and supervisors.

## 2. Courts' Continued Failure To Acknowledge Differences Between the FMLA and the FLSA

Circuit courts involved in the current split have noted that there are no relevant distinctions between public and private sector supervisors for FMLA liability purposes.<sup>134</sup> After eliminating this difference as a possible point of departure from early decisions finding in favor of individual FMLA liability for private sector supervisors, courts involved in the current split have replicated the brief "FLSA individual liability, therefore FMLA liability" analysis described in Part II.A.2.<sup>135</sup> Although the failure of the modern circuit courts to address the relevant differences between the FLSA and the FMLA is disappointing,<sup>136</sup> it is unsurprising given the almost total lack of such analysis in early decisions finding in favor of liability for private sector supervisors.<sup>137</sup>

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dence with little or no predictive or prudential value."); Meghan Riley, Comment, *American Courts Are Drowning in the "Gene Pool": Excavating the Slippery Slope Mechanisms Behind Judicial Endorsement of DNA Databases*, 39 J. MARSHALL L. REV. 115, 127 (2005) ("[Some critics] characterize the Fourth Amendment 'totality of the circumstances' balancing approach (used by many courts to justify DNA collection from convicts) as a 'malleable and boundless standard.'" (citing *United States v. Kincade*, 379 F.3d 813, 860 (9th Cir. 2004) (Reinhardt, J., dissenting))). In a prominent federal administrative law case, the late Justice Antonin Scalia remarked that "th'ol' 'totality of the circumstances' test" is the test "most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect)." *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

134. See, e.g., *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002) ("We see no reason to distinguish employers in the public sector from those in the private sector.").

135. See, e.g., *Graziadio*, 817 F.3d at 422; *Modica v. Taylor*, 465 F.3d 174, 186–87 (5th Cir. 2006); *Darby*, 287 F.3d at 680–81 (noting the similarities between the FLSA and FMLA definitions of "employer" before finding that the "plain" language of the FMLA allowed for the imposition of individual liability on public sector supervisors).

136. See *supra* Part II.A.2.

137. See, e.g., *Mercer v. Borden*, 11 F. Supp. 2d 1190, 1191 (C.D. Cal. 1998)

C. WHEN PRACTICE DOESN'T MAKE PERFECT: THE NEGATIVE  
IMPACT OF BAD PRECEDENT ON THE PUBLIC SECTOR INDIVIDUAL  
LIABILITY CIRCUIT SPLIT

In sum, courts involved in the current circuit split regarding individual liability for public sector supervisors have turned to precedent addressing the individual liability question with respect to the private sector for guidance. Such reliance is problematic due to the courts' production of an array of indefinite judicial tests<sup>138</sup> and failure to discuss the ways in which the FMLA differs from the FLSA.<sup>139</sup> Thus far, circuit courts' reliance on private sector individual liability precedent has produced more FMLA "control tests"<sup>140</sup> and has threatened to continue the trend of omitting FMLA-specific analyses.<sup>141</sup> Part III, below, suggests a solution that would halt these negative trends and settle the current circuit split regarding individual liability for public sector supervisors.

III. CLARITY THROUGH CONGRESS: AMENDING THE  
FMLA TO PRECLUDE INDIVIDUAL LIABILITY FOR  
SUPERVISORS AND IMPOSE RESPONDEAT SUPERIOR  
LIABILITY

The current circuit split regarding individual FMLA liability for public sector supervisors presents an opportunity for Congress to declare, for the first time, its intent regarding the imposition of individual liability under the FMLA.<sup>142</sup> While the

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(providing no FMLA-specific policy analysis and concluding that "[s]ince the definition of 'employer' is identical to the definition of 'employer' in the FLSA, the Court holds individuals are potentially subject to liability under the FMLA"); *Johnson v. A.P. Prods., Ltd.*, 934 F. Supp. 625, 629 (S.D.N.Y. 1996) (giving no FMLA-specific policy justifications before stating that "[i]n light of the expansive interpretation given the term 'employer' in the FLSA, this Court follows *Freemon* in holding that the FMLA 'extends to all those who controlled in whole or in part [plaintiff's] ability to take a leave of absence and return to her position.'" (citing *Freemon v. Foley*, 911 F. Supp. 326, 331 (N.D. Ill. 1995))).

138. See *supra* notes 106–11 and accompanying text.

139. See *supra* Part II.A.2.

140. For examples of modern courts producing "control tests," see *Graziadio*, 817 F.3d at 422–23, and *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 418–19 (3d Cir. 2012).

141. See, e.g., *Modica v. Taylor*, 465 F.3d 174, 186–87 (5th Cir. 2006) (demonstrating how modern courts rely on similarities between the FLSA and FMLA, not FMLA-specific arguments, in their analysis); *Darby v. Bratch*, 287 F.3d 673, 680–81 (8th Cir. 2002).

142. A discussion of individual liability is notably absent from the FMLA's

Supreme Court or the Department of Labor could also take steps to resolve the split, Congress is best equipped to definitively settle the issue for the reasons discussed in Section A. In Section B, this Note proposes that Congress amend the FMLA to preclude individual liability for both private and public sector supervisors and, instead, impose respondeat superior liability.<sup>143</sup>

#### A. WHY CONGRESSIONAL ACTION IS THE APPROPRIATE VEHICLE FOR CHANGE

Congressional action is the best means of resolving the current circuit split because the answer to the individual liability problem lies in Congress's intent. The remainder of Section A notes that the Supreme Court has thus far declined to resolve the split and asserts that a congressional amendment would provide a speedy and definitive solution to a problem that has vexed the courts since the FMLA was enacted.

##### 1. The Supreme Court Has Declined To Resolve the Current Circuit Split

As recently as 2004, the Supreme Court declined to step in and resolve the circuit split regarding individual FMLA liability for public sector supervisors.<sup>144</sup> And while some may view the Supreme Court's failure to resolve the split as a suggestion that the FMLA individual liability issue is unimportant, it is also possible that the Court is waiting for Congress to step in and pronounce its intent regarding individual FMLA liability.<sup>145</sup>

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legislative history. *See supra* note 12 and accompanying text.

143. Respondeat superior operates to impose liability on an employer "for torts [or statutory violations] committed by employees while acting within the scope of their employment." RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006).

144. *Mitchell v. Chapman*, 542 U.S. 937 (2004) (denying petition for certiorari). For a discussion of the Sixth Circuit's holding in this case, see *supra* notes 85–87 and accompanying text.

145. In a study analyzing congressional responses to federal circuit court decisions, Stefanie A. Lindquist and David A. Yalof noted the following with regard to Congress's role in resolving circuit splits: "Congress has assumed some role for itself as resolver of conflicts among the federal circuits, whether it does so before an interested Supreme Court seizes on that opportunity or (as is most often the case) because the Supreme Court itself shows no interest in doing so." Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 60, 67 (2001). While Lindquist and Yalof concluded that Congress was "not nearly as active as the Supreme Court" in resolving circuit splits, they found that Congress "sought to

Alternatively, the Supreme Court may expect that the current circuit split regarding individual liability for public sector supervisors will eventually be resolved by the emergence of a majority rule in favor of such liability, as happened with individual liability for supervisors in the private sector.<sup>146</sup> However, as discussed in Part II.A.1, such a “solution” would be no solution at all, given the unpredictability stemming from variation in and judicial manipulation of FMLA “control tests.”

## 2. The Need for a Swift and Definitive Solution

Quite apart from the Supreme Court’s refusal to resolve the current circuit split, Congress could settle the split more conclusively than any judicial resolution by amending the FMLA and expressly stating its intent.<sup>147</sup> Given the FMLA’s statutory ambiguity and absence of on-point legislative history,<sup>148</sup> the individual liability problem centers on Congress’s intent. Much of the reasoning of courts finding for the imposition of individual liability on public or private sector supervisors is based on the assumption that Congress intended for FMLA liability to parallel FLSA liability.<sup>149</sup> Similarly, the Department of Labor’s implementing regulations place great emphasis on the similarity between the FLSA and FMLA definitions of “employer” before stating that “[a]s under the FLSA, individuals such as corporate officers ‘acting in the interest of an employer’ are

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amend existing statutes or to pass new legislation to resolve at least 19 instances of conflict among the circuits” between the years 1990 and 1998. *Id.* at 66–67.

146. See ELLEN E. McLAUGHLIN, SEYFARTH SHAW, LLP, CURRENT DEVELOPMENTS IN EMPLOYMENT LAW: FAMILY AND MEDICAL LEAVE ACT DEVELOPMENTS 93 (July 24–26, 2008), Westlaw SP003 ALI-ABA 845, 930 (“[T]he vast majority of courts which have addressed individual liability under the FMLA have held that private sector employees with supervisory authority can be held liable in their individual capacities for FMLA violations.”).

147. Then-Judge Ruth Bader Ginsburg once stated the following with regard to Congress’s role in resolving circuit splits: “There is, of course, an ideal intercircuit conflict resolver . . . Congress itself. On the correct interpretation of federal statutes, no assemblage is better equipped to say which circuit got it right.” *Intercircuit Panel of the United States Act: Hearing on S. 704 Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 99th Cong. 115 (1985) (statement of Judge Ruth Bader Ginsburg).

148. See *supra* note 12 and accompanying text.

149. See, e.g., *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 417 (3d Cir. 2012) (“[T]he FMLA’s similarity to the FLSA indicates that Congress intended for courts to treat the FMLA the same as the FLSA, rather than treating only specific provisions alike . . . .” (citing *Modica v. Taylor*, 465 F.3d 174, 186 (5th Cir. 2006))).

individually liable for any violations of the requirements of FMLA.”<sup>150</sup> The Department of Labor presumably emphasized this definitional similarity because it viewed the similarity as evidence of Congress’s intent that the FMLA, like the FLSA, impose individual liability.<sup>151</sup> In contrast to judicial and agency action, Congress can definitively resolve the circuit split by simply stating its intent.

In addition to being best situated to provide a definitive resolution to the circuit split, Congress is also in the best position to resolve the split quickly. Congress could settle the circuit split faster than the Supreme Court, especially since it is probable that the Supreme Court will never step in to settle the split.<sup>152</sup> Additionally, an amendment precluding individual liability could likely garner the bipartisan support necessary to achieve swift passage through Congress; unlike family leave itself,<sup>153</sup> FMLA individual liability is not a politicized issue on which each of the major political parties has taken a stance. Consequently, Congress is best situated to resolve the circuit split finally and swiftly.

### 3. Addressing Counterarguments: Why Congressional Action Is Necessary and Would Not Be Unprecedented

Although this Note advocates for congressional resolution of the current circuit split, there exist counterarguments that press for a hands-off approach or question the propriety of congressional intervention following years of apparent acquiescence. One counterargument to congressional resolution is that

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150. 29 C.F.R. § 825.104(d) (2015).

151. See *Haybarger*, 667 F.3d at 414 (noting that the Department of Labor responded to concerns about the imposition of FMLA individual liability by stating that Congress chose to define “employer” similarly under the FMLA and FLSA, and individual liability may be imposed under the FLSA).

152. See Deborah Beim & Kelly Rader, *Evolution of Conflict in the Courts of Appeals* 26 (May 12, 2015) (preliminary draft prepared for the 2015 Midwest Political Science Association Annual Meeting), [http://campuspress.yale.edu/beim/files/2011/10/Beim\\_Rader\\_Conflicts-xxkfk0.pdf](http://campuspress.yale.edu/beim/files/2011/10/Beim_Rader_Conflicts-xxkfk0.pdf) (“We find that very few conflicts in the Courts of Appeals are resolved [by the Supreme Court]—only 5% of the conflicts we identified as being born in 2005 have been resolved as of yet. Those that are resolved are resolved soon after they begin . . . [T]he median number of years between birth and resolution is 1.”).

153. See Donna R. Lenhoff & Lissa Bell, *NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, GOVERNMENT SUPPORT FOR WORKING FAMILIES AND FOR COMMUNITIES: FAMILY AND MEDICAL LEAVE AS A CASE STUDY 1* (2016), <http://www.nationalpartnership.org/research-library/work-family/fmla/fmla-case-study-lenhoff-bell.pdf> (noting that it took a nine-year effort from 1984 until 1993 for the FMLA to become law).

the public sector individual liability issue is not a pressing one and the courts can resolve it without intervention by the Supreme Court or Congress. However, the number of federal FMLA lawsuits has rapidly increased<sup>154</sup> and the current judicial regime involving several malleable “control tests” is ill-equipped to tackle this onslaught of litigation. Employers and supervisors will continue to grapple with FMLA liability exposure under a regime of “control tests,” since each “control test” emphasizes different elements of the employment relationship and invites judicial manipulation.

An additional counterargument revolves around the notion of congressional acquiescence: Congress has said nothing about the individual liability issue for over twenty years, so why would it intervene now? While Congress has admittedly remained silent on the issue in the years since the FMLA was enacted, amending the FMLA and overriding the judicial “control tests” that have developed over time would not necessarily be out of character for Congress.<sup>155</sup> In short, a congressional amendment imposing respondeat superior liability would provide an appropriately swift, administrable solution to the urgent problem presented by the current circuit split.

#### B. A STEP TOWARD CLARITY: CONGRESSIONAL AMENDMENT TO THE FMLA TO PRECLUDE INDIVIDUAL LIABILITY

Given that Congress is best situated to resolve the current split, this Note proposes that Congress amend the FMLA to preclude individual liability for supervisors, both public and private, and instead impose respondeat superior liability. While multiple scholars have suggested that Congress may have intended to incorporate respondeat superior principles in the FMLA’s definition of “employer,”<sup>156</sup> no piece of legal scholarship

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154. See Terri Gillespie, *Tips To Help Stem the Rising Tide of FMLA Claims*, HR LEGALIST (Jan. 5, 2015), <http://www.hrlegalist.com/2015/01/tips-to-help-stem-the-rising-tide-of-fmla-claims> (“In 2012, there were 406 new federal FMLA cases filed nationally. In 2013, that number more than doubled to 992; and, in 2014, there were 1115 FMLA lawsuits filed in federal courts throughout the country.”).

155. See, e.g., Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 928 (1993) (noting that, in enacting the Civil Rights Act of 1991, Congress “reversed various Supreme Court decisions dealing with employment discrimination”).

156. See, e.g., Rogers, *supra* note 120, at 1313; Sperino, *supra* note 12, at 87.

has suggested that Congress *amend* the FMLA to impose respondeat superior liability. The amendment this Note proposes would alter the language in 29 U.S.C. § 2611(4)(A)(ii)(I)<sup>157</sup> to read as follows: “any agent of such person.” This language would indicate Congress’s intent to incorporate respondeat superior liability for FMLA interference or retaliation violations involving supervisors.<sup>158</sup> Inclusion of “any agent of” language in an amendment to the FMLA’s definition of “employer” would also bring the FMLA’s liability scheme in line with those of antidiscrimination statutes like the ADA and the ADEA that serve similar purposes.<sup>159</sup> Additionally, to remove any statutory ambiguity as to whether Congress intended for private employers and public agencies to be treated differently, Congress should amend 29 U.S.C. § 2611(4)(A)(iii) and § 2611(4)(a)(iv) by eliminating the word “includes” from these sections and re-

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157. The text of 29 U.S.C. § 2611(4)(A) defines “employer” for FMLA purposes and currently reads as follows:

(A) In general

The term “employer”—

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes—

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and  
(II) any successor in interest of an employer;

(iii) includes any “public agency”, as defined in section 203(x) of this title; and

(iv) includes the Government Accountability Office and the Library of Congress.

29 U.S.C. § 2611(4)(A) (2012).

158. Such “any agent of” language has been construed as imposing respondeat superior liability under employment antidiscrimination statutes such as the ADA, ADEA, and Title VII. *See, e.g.*, *U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995) (“[T]he actual reason for the ‘and any agent’ language in the [ADEA’s] definition of ‘employer’ was to ensure that courts would impose *respondeat superior* liability upon employers for the acts of their agents.”).

159. *Compare* 29 U.S.C. § 2601(b) (“It is the purpose of this Act . . . to accomplish the purposes [of the FMLA] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex . . .”), *with* 42 U.S.C. § 12101(b) (2012) (“It is the purpose of this chapter . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”), *and* 29 U.S.C. § 621(b) (“It is therefore the purpose of this chapter . . . to prohibit arbitrary age discrimination in employment.”).



designating them § 2611(4)(a)(III) and § 2611(4)(a)(IV), respectively.

Amending the text of the FMLA in this way would settle the individual liability question with finality, and is appropriate in scope because there are no relevant differences between public and private supervisors for FMLA liability purposes.<sup>160</sup> Although the private and public sectors do differ with respect to employment aspects such as budgetary constraints and emphasis on bureaucracy,<sup>161</sup> supervisors in both the public and private sector context generally exercise control over “employer-related decisionmaking” such as fielding FMLA requests.<sup>162</sup> Thus, any amendment to the FMLA regarding individual liability should affect private and public employees equally.

Parts III.B.1 and III.B.2 discuss two of the benefits of a congressional amendment that would preclude individual liability and impose respondeat superior liability: preempting the creation of more judicial “control tests” and effectuating the policy goals underlying the FMLA. Part III.B.3 addresses several counterarguments to the solution that this Note proposes.

#### 1. Preempting the Creation of More “Control Tests”

As discussed in Part II.B.1, the Second and Third Circuits’ application of an “economic realities” test in conjunction with broad “totality of the circumstances” language foreshadows the emergence of even more judicial “control tests” for imposing individual FMLA liability. An amendment imposing respondeat superior liability would bring with it a more confined and defi-

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160. See Brainerd, *supra* note 21, at 1587–88 (“[T]here is no fundamental difference between public and private sector supervisors and, as a result, their liability exposure should remain equal.”); Kegan A. Brown, *supra* note 12, at 1056. But see Shaili Pezeshki, Comment, *The FMLA and Its Shortcoming: Can Your Supervisor Wrongfully Terminate Just Because You Work in a Public Agency?*, 40 SW. L. REV. 551, 568 (2011) (arguing that there are “inherent institutional differences” between public and private employment and that, while individual liability should be imposed on both public and private supervisors, there should be a higher threshold for the imposition of such liability on public sector supervisors).

161. See *Management Challenges: Government vs. Private Sector*, GOVLEADERS.ORG, <http://govleaders.org/matrix.htm> (last visited Oct. 15, 2016) (comparing the challenges faced by public and private sector supervisors with respect to budgetary constraints, hiring, firing, bureaucracy, and procurement).

162. See Brainerd, *supra* note 21, at 1606 (“Though public sector supervisors may not have direct control over actual salaries, they are still likely to have significant control over bonuses, availability of overtime, promotions and other such employer-related decision-making.”).

nite judicial test: an employer would be subject to liability for FMLA violations committed by its employees “while acting within the scope of their employment.”<sup>163</sup>

Although it would promote consistency, the “within the scope of employment” judicial test would present a trade-off to employers. It is likely that nearly every FMLA lawsuit alleging interference with or retaliation for exercising FMLA rights would subject an employer to respondeat superior liability, since granting or denying FMLA leave or retaliating against an employee for exercising FMLA rights will arguably always be “within the scope of a supervisor’s employment.”<sup>164</sup> On the other hand, this level of predictability would enable employers to better estimate the legal liability they face and structure their businesses accordingly.<sup>165</sup> For the reasons discussed in Part III.B.2, this trade-off ultimately supports the achievement of the FMLA’s goals and promotes good policy.

## 2. Effectuating the FMLA’s Goals and Promoting Sound Policy

A congressional amendment precluding individual liability for supervisors under the FMLA and imposing respondeat superior liability would support the achievement of the remedial goals Congress delineated when it enacted the FMLA.<sup>166</sup> First, imposing respondeat superior liability would align the FMLA’s liability scheme with those of other federal antidiscrimination statutes and express a commitment to compensating employees’ whose FMLA rights have been violated.<sup>167</sup> Second, an employer-entity, not its supervisors, is in the best position to pro-

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163. RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006). The American Law Institute states that “[a]n employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control.” *Id.* § 7.07(2).

164. See Rogers, *supra* note 120, at 1313.

165. Cf. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1598 (2008) (“[I]nconsistent interpretation of federal law could be more disruptive than variations in state laws [for multi-state actors].”); COMM’N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 206–07 (1975) (“[D]ifferences in legal rules applied by the circuits result in unequal treatment of citizens . . . solely because of differences in geography . . .”).

166. See *supra* Part I.A.1 (delineating Congress’s purposes in enacting the FMLA).

167. See *supra* notes 158–59 and accompanying text. As discussed in Part II.A.2, there are relevant differences between the FLSA and FMLA such that altering the FMLA’s liability scheme to align with those of antidiscrimination statutes, instead of the FLSA, is intuitive.

vide the FMLA's remedies to an aggrieved plaintiff-employee in the event of a statutory violation.<sup>168</sup> Third, under the proposed amendment's definitions, there would be no question as to whether low-level supervisors are "employees" capable of asserting their FMLA rights.<sup>169</sup> Finally, imposing respondeat superior liability for FMLA violations would incentivize employers to provide effective FMLA compliance training and protect employees' FMLA rights so as to limit legal liability.<sup>170</sup> In short, amending the FMLA to impose respondeat superior liability would accomplish the goals Congress set forth at the time of the FMLA's enactment more effectively than an individual liability scheme.

### 3. Addressing Counterarguments: Why the Proposed Congressional Amendment Is Necessary

Although this Note posits that a congressional amendment imposing respondeat superior liability will lead to more efficient and complete achievement of the FMLA's goals, court cases and scholarly literature raise several counterarguments to this assertion. Parts III.B.3.a and III.B.3.b address statutory interpretation and practical counterarguments to the proposal that Congress amend the FMLA to preclude individual liability and impose respondeat superior liability.

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168. See Rogers, *supra* note 120, at 1340. Scholars have made similar arguments for imposing respondeat superior liability in order to fully compensate plaintiffs for violations of Title VII. See Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 543 (1996) ("It is the employer who is best positioned to remedy discrimination when it occurs. An award of backpay and compensatory and punitive damages against a supervisor often may be uncollectible, as most individuals do not have the assets to satisfy such awards." (footnote omitted)).

169. As Sperino notes, labeling a low-level supervisor an "employer" for purposes of individual liability could prevent these individuals from being considered "employees" who may take advantage of the FMLA's protections. See Sperino, *supra* note 37, at 225–26.

170. See RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (AM. LAW INST. 2006) ("Respondeat superior creates an incentive for principals to choose employees and structure work within the organization so as to reduce the incidence of tortious conduct. This incentive may reduce the incidence of tortious conduct more effectively than doctrines that impose liability solely on an individual tortfeasor."). Hanner White made a similar argument with respect to respondeat superior liability under Title VII. See Hanner White, *supra* note 168, at 544 ("An employer on the line for damages occasioned by its agents' discrimination not only has a powerful incentive to ensure those agents comply with the law but also has the means to do so.").

*a. Counterargument to Proposed Solution: The Similarity Between the FMLA and FLSA Definitions of “Employer” Demonstrate Congress’s Intent That the Two Be Construed Similarly*

The primary argument advanced by courts holding in favor of imposing individual liability in both the private and public sectors focuses on the similarity between the FMLA and FLSA definitions of “employer.”<sup>171</sup> While such an argument is a rational one, it is refuted by the legislative history of the FMLA, which must be considered after one acknowledges that the FMLA’s definition of “employer” is ambiguous.<sup>172</sup> As discussed previously, the FMLA’s legislative history includes no specific discussion of individual liability.<sup>173</sup> But perhaps more importantly, when Congress intended to achieve objectives under the FMLA similar to those it sought to achieve under the FLSA, and when Congress intended courts to interpret FMLA provisions in the same way as similar portions of the FLSA, Congress explicitly said so.<sup>174</sup> In fact, with respect to the FMLA’s definitions, Congress stated that “[t]hose definitions specifically referenced to the Fair Labor Standards Act are to be interpreted similarly under [the FMLA].”<sup>175</sup> Later in the FMLA’s legislative history, Congress defines “employer” and references the FLSA only to state its intention that “public agency” have the same definition under the FMLA as it does under the FLSA.<sup>176</sup> Thus, the assertion underlying the bulk of court opinions holding in favor of individual liability is, at best, an interpretation of the FMLA’s definition of “employer” made in the absence of on-point legislative history and, at worst, an

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171. See *supra* Parts I.B.1, I.C.1.

172. See Sperino, *supra* note 12, at 72 (“The lower courts’ failure to reach a consensus as to when imposition of individual liability is appropriate, instead creating eight different tests for individual liability, suggests that the meaning of the term ‘employer’ may not be so plain.”).

173. See *supra* note 12 and accompanying text; see also Rogers, *supra* note 120, at 1310 (“[T]here is virtually no mention made in the legislative history of the FMLA regarding the precise issue of individual versus business entity liability.”).

174. See, e.g., S. REP. NO. 103-3, at 35 (1993) (“This provision is modeled on section 15(a)(3) of the Fair Labor Standards Act of 1938 (FLSA) and is similarly intended to achieve the objective of protecting employees who file charges or otherwise participate in proceedings under this title . . . .”); *id.* at 36 (“[T]his provision is modeled after section 216(b) of the Fair Labor Standards Act, and therefore should be interpreted in the same way as the FLSA.”).

175. *Id.* at 43.

176. *Id.*

interpretation in direct conflict with the FMLA legislative history that Congress did produce.

*b. Counterargument to Proposed Solution: Unpredictability Resulting from FMLA “Control Tests” Promotes Compliance by Compelling Supervisors To Be Cautious in Denying Leave*

Another counterargument to this Note’s proposed solution is the assertion that unpredictability stemming from the inconsistent judicial application of variable FMLA “control tests” incentivizes supervisors to be overly cautious and avoid committing FMLA violations. While it is true that attorneys are pressuring their client-employers to counsel their supervisors to be cautious in handling FMLA leave requests lest they be held individually liable,<sup>177</sup> it is doubtful whether overly cautious supervisors (and overly permissive leave policies) make for a superior work environment. It is often the case that when an employee takes FMLA leave, employers reassign the absent employee’s work to his or her co-employees.<sup>178</sup> Should supervisors become overly lenient in granting leave in order to avoid incurring individual liability under the FMLA, it is possible that more employees will take advantage of FMLA leave without justification and provoke the resentment of their co-employees who are forced to pick up the slack.<sup>179</sup> So although unpredicta-

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177. See, e.g., Robert F. Manfredo, *Human Resource Professionals Beware – Second Circuit Finds HR Director May Be Individually Liable Under the FMLA*, N.Y. LAB. & EMP. L. REP. (Mar. 23, 2016), <http://www.nylaborandemploymentlawreport.com/2016/03/articles/family-and-medical-leave-act/human-resource-professionals-beware-second-circuit-finds-hr-director-may-be-individually-liable-under-the-fmla> (“[Graziadio] stands as a stark reminder to human resource professionals involved in making decisions related to employee FMLA requests to proceed with caution and to strictly comply with the requirements of the FMLA when processing requests for leave.”).

178. See SOC’Y FOR HUMAN RES. MGMT., *FMLA AND ITS IMPACT ON ORGANIZATIONS: A SURVEY REPORT BY THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT* 7 (2007) (“During an employee’s FMLA leave, nearly nine out of 10 organizations attended to the employee’s workload by assigning work temporarily to other employees.”).

179. See *HR Matters: How Absenteeism Impacts Your Co-Workers*, HUM. RESOURCES INC., <http://www.hri-online.com/blog/how-absenteeism-impacts-your-co-workers> (last visited Oct. 15, 2016) (describing how continued absenteeism can cause resentment in employees who must cover for those who are absent); *Employee Turnover and Retention*, WORKPLACE FLEXIBILITY 2010 (2007), <http://workplaceflexibility2010.org/images/uploads/EE%20turnover%20FMLA.pdf> (noting that, in response to a Department of Labor request for information regarding the FMLA’s impact on employee morale, productivity, turnover, and retention, employers “mention[ed] the resentment amongst co-workers forced to cover the shifts of employees on leave”).

ble judicial “control tests” *may* cause supervisors to be more lenient in granting FMLA leave, the detriment to work environments that is likely to result therefrom threatens to outweigh the benefit resulting from the possibility of fewer FMLA violations.

### CONCLUSION

Since the mid-1990s, the FMLA has been read to encompass individual liability for private sector supervisors. But the development of this majority rule has brought with it an onslaught of malleable judicial “control tests” and uncritical acceptance of the notion that Congress intended the FMLA’s liability scheme to parallel that of the FLSA. Such reasoning persists in the current circuit split regarding the individual FMLA liability question as it applies to the public sector.

This Note proposes a solution that would resolve the current circuit split regarding individual liability for public sector supervisors. Amending the FMLA to incorporate respondeat superior liability would put a halt to the creation of malleable judicial “control tests,” resulting in greater predictability for both supervisors and employers seeking to advise their supervisors in order to avoid committing FMLA violations. Additionally, the imposition of respondeat superior liability would better promote the effectuation of the goals that Congress originally set out to achieve when it enacted the FMLA, since employers are best situated to both prevent FMLA violations from occurring and compensate aggrieved plaintiff-employees when violations do occur. In sum, a congressional amendment to preclude individual liability and instead impose respondeat superior liability would pave the way for the improvement of FMLA compliance in both public and private sector work environments.